APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 93-3285/3286/94-1190

Gamma-10 Plastics, Inc.,

Plaintiff, Appellant
and Cross-Appellee,

v.

American President Lines, Ltd.;
American President Companies, Ltd.,

Defendants, Appellees
and Cross-Appellants.

Appeal from the United States District Court
for the District of Minnesota, Third Division

Submitted: May 11, 1994
Filed: August 10, 1994

Before McMILLIAN, Circuit Judge, LIVELY,* Senior Circuit Judge, and WOLLMAN, Circuit Judge.

LIVELY, Senior Circuit Judge.

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* The HONORABLE PIERCE LIVELY, Senior Circuit Judge for the Sixth Circuit, sitting by designation.

A jury in this maritime case rendered a verdict in favor of the shipper and against the carrier for failure to deliver goods and for damages to other goods caused by negligence of the carrier. In post-trial proceedings the district court awarded prejudgment interest to the plaintiff, but refused to award attorney fees. Both parties appealed and the court consolidated the appeals from the judgment following trial and from the order deciding post-trial motions.

I.

A.

This case arises out of a 1988 contract for carriage by sea between Gamma-10 Plastics, Inc. (G-10) and American President Lines, Ltd. (APL). The contract called for APL, one of the largest steamship carriers in the world, to transport G-10's plastic resin from the United States and deliver it to customers at various ports in China. The resin was packed in bags, which in turn were placed by APL in large sealed containers for shipment. The controversy concerns four shipments of plastic resin: (1) five sealed containers of resin shipped to Whampoa, China in August, 1988; (2) five containers shipped to Shanghai, China, in October, 1988; (3) six containers shipped to Hong Kong in October, 1988; and (4) four containers held by APL in Los Angeles after a dispute arose over the previous shipments.

Somehow, G-10's first shipment of resin was lost on the docks of Whampoa. Throughout the investigation of the lost goods, APL claimed that they were on the Tung Kwong Hau Pier (Tung Pier), and provided G-10 with the name and telephone number of a contact person in Whampoa for verification. APL maintained at trial that there was nobody present at the docks to pick up the resin be-

cause G-10 had a poor product and lost its principal Chinese contract (the Acada contract) with Wallon Energies. G-10, on the other hand, claimed that a second Chinese company, Vic International, assumed the Acada contract and that an agent for Vic International went to Tung Pier three times in search of the goods but never found them. In response to the loss of its resin, G-10 sent APL two written complaints for lost or missing goods in October and November of 1988. APL ignored the complaints, and G-10 charged that APL's conduct became vindictive after the grievances were filed.

G-10's second shipment was loaded on board ship at Los Angeles on September 8, 1988, and discharged at Hong Kong on September 24. For some reason APL did not make out a bill of lading for this shipment until October 4, 1988, after the resin had been unloaded in Hong Kong. According to G-10's president, this shipment was supposed to have gone directly to Shanghai. At any rate, because Vic International succeeded the original purchaser, Wallon Energies, as consignee, G-10 directed APL to hold the shipment in Hong Kong until delivery in Shanghai could be arranged. There is some confusion as to the whereabouts of the goods prior to their reappearance in Shanghai on November 10. G-10 claims that it asked APL to deliver the goods to Shanghai by October 13, but that the goods did not arrive timely. APL counters that G-10 did not release the goods to Shanghai until November 4, and that it dutifully shipped the goods by November 10.

In November, 1988, G-10's president, Joseph Kopstein, flew to China to find the missing resin from the two shipments. When he finally located the resin from the first shipment in Whampoa, someone had removed it from the sealed containers and many of the resin bags were ripped. G-10 contended at trial that as a result of the condition

of the goods and the three month delay in locating them, it suffered the cancellation of the Acada contract and lost its primary Chinese customer, Vic International. As with the first shipment, when G-10 located the resin from the second shipment in Shanghai, it had been taken out of the sealed containers and damaged. After paying the ocean freight and storage charges, G-10 finally sold this resin on July 12, 1989.

G-10 alleges on appeal that after the first shipment was lost, APL purposefully interfered with its attempt to re-sell the million pounds of resin that remained in China. G-10's potential customers insisted on testing samples of the resin before buying large amounts. However, APL refused to provide access to the resin until G-10 paid $60,000 claimed to be due in shipping and storage costs. G-10 asserts that the costs claimed by APL resulted from APL mistakenly shipping the third batch of resin to China. G-10 sent this resin to Los Angeles, but specifically told APL not to transport it to Hong Kong. At oral argument APL admitted mistakenly shipping the resin. According to G-10, APL not only delivered the goods to China, but stored them in a very expensive Hong Kong terminal despite suggestions from APL's own Los Angeles office to store the goods in free storage at a nearby APL facility in Taiwan. G-10 further claims that APL violated U.S. shipping laws by charging it at a rate that was 30% higher than the published tariff permitted. G-10 thus contends that the $60,000 claimed by APL was not its responsibility.

G-10 cites several other instances of alleged misconduct by APL. For example, APL originally quoted G-10 a price of $7,240 to store its fourth shipment of resin in Los Angeles. However, G-10 claims that APL raised the price to $37,819 after G-10 filed the instant lawsuit. Also, after

this lawsuit was filed G-10 found a buyer in Jakarta, Indonesia for the fourth shipment of resin. APL told G-10 that there was no published rate to Jakarta, and that it would cost $133,000 to ship 100 metric tons, considerably more than the shipment itself was worth. In an attempt to prove discrimination, G-10 asked an associate in the industry, Sandra Renner, to obtain a quote from APL to send the identical amount of resin to Jakarta. G-10 presented evidence that APL advised Renner there was a published rate to Jakarta, and that it would cost $13,900 to ship 100 metric tons.

B.

G-10 filed this action against APL in a Minnesota state court on July 2, 1990. Soon after G-10 filed its complaint, APL removed the case to federal court in Minnesota under 28 U.S.C. §1332, basing jurisdiction on diversity of citizenship. G-10 then filed an amended complaint in which it sought damages of $3,536,000 for negligence and negligent or intentional misrepresentation.

In its answer APL pled several affirmative defenses under the United States Carriage of Goods by Sea Act (COGSA), 46 U.S.C. App. §1300-1315 (1988). As one defense, APL cited the COGSA statute of limitations that provides, "the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered. . . ." COGSA §1303(6). APL claimed that it delivered all of G-10's resin between September 15 and November 15, 1988, but that G-10 did not file suit until July 2, 1990, more than one and one-half years after the last shipment of the goods.

G-10 moved for partial summary judgment on APL's affirmative defenses, which the district court granted. The district court agreed that APL could extend COGSA contractually by inserting appropriate language in a bill of lading. The court struck APL's affirmative defense of limitations, however, after finding that APL delivered its bill of lading to G-10 only after G-10's goods were shipped and that G-10, an inexperienced shipper, was unaware of the contractual extension of COGSA in APL's bill of lading.

Midway through a five week trial, G-10 moved the court for permission to amend its pleadings to claim punitive damages. The district court refused, stating that G-10's evidence against APL was "circumstantial" and did not show "clear and convincing evidence of deliberate disregard for the plaintiff's rights or safety." The district court also rejected G-10's request to instruct the jury on punitive damages. After three days of deliberation, the jury returned a verdict in G-10's favor for $500,000, but also specifically found that APL did not commit fraud, and that G-10 owed APL almost $13,000 in unpaid freight for the first resin shipment to Whampoa.

II.

In its cross-appeal APL seeks reversal of the district court's denial of its motion for summary judgment on the basis of limitations. Inasmuch as some or all of the remaining issues will become moot if we determine that G-10's suit was barred by limitations, we consider that question first, reviewing the district court's decision *de novo*. See *Cox v. Mid-American Dairymen, Inc.*, 13 F.2d 272, 274 (8th Cir. 1993).

A.

Two federal statutes set forth the rights, duties and obligations of shippers and carriers of cargo by sea. Congress enacted the Harter Act, 46 App. U.S.C. 190-196 (1988), in 1893. It governs shipments between "ports of the United States and foreign ports," and applies to the entire period that a carrier has possession of a shipper's goods, from prior to loading until after discharge. The Act contains no limitations period and specifically prohibits a carrier from inserting into its bill of lading a general release from negligence. However, carriers may "impose a limitations period on all claims against them for negligence, without violating the Act, so long as the time period specified is reasonable." *Ins. Co. of North America v. Puerto Rico Marine Management, Inc.*, 768 F.2d 470, 473 (1st Cir. 1985), *cert. denied*, 474 U.S. 1102 (1986).

Congress enacted COGSA, which also defines rights, responsibilities and liabilities of carriers of goods by sea in 1936. COGSA represented the American enactment of the Hague Rules, which resulted from efforts in the 1920s to bring about uniformity and simplification of bills of lading used in international trade. *Union Ins. Society of Canton v. S.S. Elikon*, 642 F.2d 721, 723 (4th Cir. 1981). Unlike Harter, COGSA contains a one year statute of limitations for "all liability in respect of loss or damage" to goods shipped internationally. COGSA §1303(6). COGSA supersedes the Harter Act only with regard to the time a shipper's goods are on board a carrier's ship. COGSA §1311. Since by its terms COGSA applies only to the period between loading and discharge, it does not apply of its own force in a case like the present one, which involves an alleged loss of and damage to G-10's resin after APL unloaded it in China. If COGSA does not apply, then the Harter Act controls and there is no statute of limitations applicable to G-10's claims.

With respect to the first two shipments, APL concedes that COGSA does not itself apply because G-10's claims clearly arise from events occurring after its resin was unloaded from APL's ship. However, the terms of COGSA may be contractually extended by a carrier's bill of lading. COGSA §1307; *Colgate Palmolive Co. v. S/S Dart Canada*, 724 F.2d 313, 315 (2d Cir. 1983), *cert. denied*, 466 U.S. 963 (1984). Thus APL correctly states that it can extend COGSA's one year statute of limitations to the period after discharge of goods, thereby superseding the Harter Act and preventing G-10 from suing more than a year after injury. *Ins. Co. of North America v. Puerto Rico Marine Management, Inc.*, 768 F.2d 470, 475 (1st Cir. 1985) (bill of lading similar to APL's extends one year statute of limitations to injury arising after discharge), *cert. denied*, 474 U.S. 1102 (1986); *Firestone Tire & Rubber Co. v. Almacenes Miramar, Inc.*, 452 F. Supp. 670 (D.P.R.), *aff'd*, 588 F.2d 817 (1st Cir. 1978) (COGSA's one year statute of limitations supersedes Harter Act and controls where bill of lading extends COGSA to period after discharge).

APL inserted the extended terms of COGSA into its bills of lading under a "clause paramount," which states that

> [t]he receipt, custody, carriage and delivery of the Goods are governed by the provisions of the transportation agreement evidenced hereby and incorporated by reference, including . . . (iii) the provisions of the U.S. Carriage of Goods by Sea Act, 1936, ("COGSA"). . . . [which] shall be extended to apply . . . before the Goods are loaded on and after they are discharged from the vessel, and throughout the entire time during which the Carrier is responsible for the Goods under the transportation agreement.

B.

APL completed the bill of lading for the first shipment the day following loading and sent it by overnight mail to G-10. Although the president of G-10 denied receiving it until late September, the record belies this claim; the president negotiated the bill of lading at a bank on July 22. Since a carrier may extend the provisions of COGSA to the post-discharge period by incorporating COGSA into its bill of lading, APL argues that G-10 was bound by the terms of the "clause paramount." Even though G-10 had the bill of lading in hand immediately after the ship was loaded and sailed, it waited more than fifteen months after the cargo should have been delivered before bringing suit. Thus, APL asserts, this action was time-barred.

APL did not make out the bill of lading for the second shipment until after the shipment arrived in Hong Kong, and we cannot determine from the record when, if ever, this bill of lading was delivered. The bill of lading for this shipment is APL's standard bill, similar to the one used for the first shipment. The record contains no information about the bill of lading issued for transshipment from Hong Kong to Shanghai. APL gave its bill of lading number in answers to interrogatories, but it is not clear whether it was a standard APL bill of lading or one issued by the coastal carrier that moved the resin to Shanghai.

APL argues that the majority of courts that have addressed the issue have found shippers bound by the terms of COGSA so incorporated and extended, and that this court should contribute to uniformity in admiralty law by reversing the district court. APL argues that the two decisions relied upon by G-10 are "inapposite." We will discuss those cases more fully in our analysis of the issue. See *Encyclopedia Britannica, Inc. v. SS Hong Kong Producer*, 422 F.2d 7 (2d Cir. 1969), *cert. denied*, 397 U.S.

964 (1970), and *Allstate Insurance Co. v. International Shipping Corp.*, 703 F.2d 497 (11th Cir. 1983).

In addition to contending that G-10 had actual notice that the incorporated COGSA provisions required suit to be commenced within one year, APL argues that G-10 had constructive notice of this fact. APL issued its standard long form bill of lading to G-10. There was nothing "hidden or ingenious" in the bill and the clause paramount is not "unusual," according to APL. Because this bill of lading was on file with the Federal Maritime Commission (FMC), and available to all shippers, APL maintains that G-10 had constructive notice of its provisions.

C.

G-10 counters these arguments with the straightforward assertion that the Harter Act, which contains no statute of limitations, applies to the facts of this case. In the absence of a statute of limitations, suit would be time-barred only by application of the equitable doctrine of laches. APL did not plead or attempt to prove the elements of laches, and the district court correctly did not consider that defense. Furthermore, G-10 says, it brought suit within a reasonable time.

G-10 contends that only a bilateral agreement between a shipper and a carrier can restrict the shipper's rights under the Harter Act, and that APL acted unilaterally in attempting to extend COGSA's provisions, through its bill of lading, to the post-discharge period. Under the Harter Act, a shipper must have knowledge of a carrier's attempt to limit its rights and a "fair opportunity" to respond. G-10 asserts that it had no opportunity to object to the incorporation of extended COGSA rights into APL's bill of lading because APL did not deliver its bills

until after the ships containing G-10's goods departed. According to G-10, a carrier's failure to deliver a bill of lading prior to departure of the ship bearing the shipper's cargo renders the terms of the bill "legally ineffective."

III.

We must determine, on the facts of this case, the proper effect to be given to APL's incorporation of extended COGSA provisions by reference in the bills of lading issued to G-10.

A.

A bill of lading is a contract of adhesion that is strictly enforced against the carrier. *Mori Seiki USA, Inc. v. M.V. Alligator Triumph*, 990 F.2d 444, 448 (9th Cir. 1993). One purpose of COGSA is "to protect shippers from the overreaching of carriers through contracts of adhesion and to provide incentive for careful transport and delivery of cargo." *Cameco, Inc. v. S.S. American Legion*, 514 F.2d 1291, 1300 (2d Cir. 1974). When COGSA is inserted into a carrier's bill of lading it becomes a contractual term subject to the same interpretive rules to which any contractual clause is susceptible. *Colgate*, 724 F.2d at 315.

The District court found that G-10 did not have sufficient notice of the contractual terms placed in APL's bills of lading, not having received copies until after the goods were loaded and out of G-10's control. Although the parties disagree as to when G-10 finally acquired the bill of lading for the first shipment, it is clear that it was not until after G-10's resin was loaded for shipment to China. As stated, according to APL's answers to interrogatories, it did not issue the bill of lading for the second shipment until the ship bearing the resin had left port in the United

States and actually arrived in Hong Kong. COGSA only applies to the post-discharge stage if the parties contractually agree to allow it to do so. Thus the critical question in this case is whether G-10 agreed to the extension of COGSA's provisions, including the 1-year limitations period, to include the post-discharge stage. See *Davis Elliott International, Inc. v. Pan America Container Corp.*, 705 F.2d 705, 708-09 (3d Cir. 1983) (summary judgment for carrier reversed to give shipper an opportunity to prove that it never agreed to apply COGSA to preloading stage). Included in this inquiry is the further question whether, once it received the bill of lading, G-10 had a "fair opportunity" to object to APL's attempt to extend the limitations provision to cover the post-delivery stage. *Mori Seika USA, Inc. v. M.V. Alligator Triumph*, 990 F.2d 444, 448-49 (9th Cir. 1993); *Caterpillar Overseas, S.A. v. Marine Transport, Inc.*, 900 F.2d 714, 719 (4th Cir. 1990).

B.

The parties center their attention on *Encyclopedia Britannica, Inc. v. SS Hong Kong Producer*, 422 F.2d 7 (2d Cir. 1969), *cert. denied*, 397 U.S. 964 (1970). In *Britannica*, 1300 cartons of books were damaged when a carrier stowed the books on deck for transport. The carrier issued the shipper, Britannica, a "short form" bill of lading that contained little information but notified Britannica where it could obtain a long form bill of lading. The long form bill of lading included a provision allowing the carrier to store goods on deck absent a specific request to the contrary by the shipper. Importantly, the short form bill of lading was issued *after* the delivery of the goods. Also Britannica was not notified of the provisions in the bill of lading prior to shipment, had no previous dealings with the carrier, and had never seen the carrier's bill of lading.

After studying the historical backdrop of the Harter Act and COGSA, the Court of Appeals found that the bill of lading was not binding on Britannica. The court noted that COGSA was meant to alleviate the problems associated with hidden bill of lading terms and that "it is impractical for a shipper to be compelled to make a detailed study of all of the fine print clauses of the carrier's regular bill on each occasion *before it ships out a package.*" *Id.* at 14 (emphasis added). The court found that the carrier was estopped from asserting its rights under the bill of lading because it was not issued until after the goods were loaded, making it impossible for Britannica to notify the carrier prior to delivery of a desire to have the goods stored beneath the deck. *Id.* at 16-17.

We have no doubt that *Britannica* was correctly decided under its facts. The only way Britannica could have objected in time to insist that the books be stored below deck was prior to shipping them out. Thus, the timing of the delivery of the bill of lading was critical. Because the carrier did not deliver a bill of lading until it was too late for the shipper to rectify the situation, the shipper did not have a fair opportunity to protect its goods. We do not believe, however, that *Britannica* stands for the proposition that a bill of lading sent to a shipper after the shipper's goods are loaded is never effective to delineate the terms and conditions of the passage of goods.

G-10 also places heavy reliance on *Allstate Ins. Co. v. International Shipping Corp.*, 703 F.2d 497 (11th Cir. 1983). Like *Britannica*, *Allstate* involved a shipper's claim for damages caused by a carrier's handling of cargo. In *Allstate*, the shipper loaded goods in sealed container trailers for delivery to the carrier. A freight forwarder delivered the containers to a carrier that did not ship containers or trailers, and opened the sealed containers prior

to shipment. The defendant freight forwarder never notified the shipper of the carrier's policy of unloading sealed containers. After unloading the containers, the carrier left the shipper's goods out in the weather and they arrived at their destination in a damaged condition. The district court found that the goods were damaged as a result of exposure to the elements prior to loading on board the ship and awarded damages to Allstate, the shipper's insurer and subrogee.

The court of appeals affirmed, finding that the short form bill of lading delivered to the shipper contained no indication that the shipper was bound by a statute of limitations. The carrier relied on the fact that the short form bill incorporated by reference both COGSA and the carrier's long form bill of lading that was on file with the FMC. The long form bill of lading contained a specific provision requiring the shipper to bring suit within one year of the delivery of the goods (COGSA's limitations provision did not apply because the injury to the goods occurred before shipment, and there was nothing in the bill to extend this provision to the pre-loading and post-delivery stages).

The Court of appeals rejected the carrier's claim of constructive notice and found that the shipper did not have actual knowledge of the terms contained in the long form bill. The court stated:

> [W]e are reluctant to give effect to limiting clauses with which "a carrier could shield itself from liability through manipulation of fine print clauses contained in standardized forms." *Calmaquip Engineering West Hemisphere Corporation v. West Coast Carriers Ltd.*, 650 F.2d 633, 639-40 (5th Cir. Unit B 1981) *citing Encyclopedia Britannica, supra* at 14. In this regard we follow the Second Circuit's decision in *Encyclopedia Britannica, supra*; we will not limit the

> period within which Allstate could bring suit when that limit was expressed in fine print in a document never specifically brought to Allstate or Alumax' attention, and when neither Allstate nor Alumax had actual knowledge of its terms. *Id.* at 14.[4] This is particularly so where the limitation arguably conflicts with the absence of a specific limitations period under the Harter Act.
>
> [4] It is hard to say even International [the freight forwarder] had knowledge actual or constructive, inasmuch as the district court found International received the bills of lading *after* the ISLA DEL SOL sailed. (emphasis in original).

Id. at 500.

There are several obvious differences between the present case and *Allstate*. First and most important is the fact that the only document ever given to the shipper in *Allstate* was the short form bill of lading, which contained no reference to limitations. The carrier never supplied the long form bill, which specifically set forth the requirement that suit be brought within one year. In the present case, on the other hand, APL did deliver the bill of lading for the first shipment within a few days after loading, and that bill not only adopted COGSA and extended its provisions to the post-delivery period, but also contained a separate paragraph, titled "TIME FOR SUIT" which stated unequivocally that the carrier would be relieved of all liability unless suits were brought within one year after delivery of the goods, or after the time they should have been delivered. Second, the carrier in *Allstate* did not deliver even the short form bill until after the ship had sailed. The situation was similar to that in *Britannica*. By the time the short form bill was delivered the goods had already suffered injury and the shipper had no knowledge that they had been removed from the sealed containers and left exposed to the elements.

We believe *Britannica* and *Allstate* were correctly decided, but provide guidance on the effect of incorporating COGSA into bills of lading delivered after goods are loaded only for those cases in which the damage to goods occurs before the shipper has knowledge of an act of the carrier resulting in the damage and no fair opportunity to protest, cancel the agreement, or otherwise protect itself from the consequences of the carrier's acts.

In the present case, the goods in the first shipment were misplaced and ultimately damaged by mishandling after the voyage ended and long after the shipper received the bill of lading. Furthermore, G-10 knew the facts on which it based its claims related to the first shipment very soon after it was shipped. The president of G-10 flew to China in November of 1988, located the "lost" goods and found some of them damaged after being removed from sealed containers and left in a place where someone ripped open bags of resin. At this time G-10 had the bill of lading with its limitations provision in hand.

Although for some unexplained reason APL did not complete the bill of lading for the second shipment until the resin had been discharged in Hong Kong, if G-10 knew of the limitations provision, agreed to it and had a fair opportunity to avoid the detrimental effect of the limitations period, it was bound by this provision.

IV.

Although a bill of lading is a contract of adhesion, the language in APL's bills is clear and we can only interpret it to mean what it says. Because it is undisputed that a carrier may alter the balance created by the Harter Act to the extent of creating a statute of limitations for suit by a shipper, the only issues are whether G-10 agreed

to the limitations provision in the bills of lading and whether it had a fair opportunity to relieve itself of the burden on its rights thus created.

A.

Contrary to G-10's assertion, the bill of lading for the first shipment was not a "unilateral" alteration of the agreement between it and APL of which it had no notice. Two days after the first shipment was loaded, G-10 negotiated the bill of lading at a Minnesota bank. An export negotiator at the bank testified that the original bill, introduced into evidence by APL, contained the typewritten legend "Gamma-10 Plastics, Inc.," followed by a signature line containing the signature of G-10's president. A true copy of the bill of lading containing the typed legend and signature appear in APL's appendix. From this evidence we conclude that G-10 accepted the contents of the bill of lading as part of its agreement with APL. Otherwise, it could not have negotiated the bill.

We turn now to whether G-10 had a "fair opportunity" to relieve itself of the burden placed on its right to recover from APL for loss and damage to the first two shipments created by the statute of limitations. The court in *Mori Seiki* described the Ninth Circuit's treatment of this issue as follows:

> In a dispute over "fair opportunity" such as this one, the carrier bears an initial burden of producing prima facie evidence which demonstrates that it provided such notice to the shipper. * * * Normally, the carrier can meet this initial burden by showing that the language of COGSA Section 4(5) [liability limitation] is contained in the bill of lading. * * * Language in the bill of lading "to the same effect" as the statute is adequate. * * * On the other hand, the mere incorporation of COGSA by reference is not adequate.

> * * * Once the carrier meets this initial burden, the burden of disproving fair opportunity [shifts] to the shipper.

990 F.2d at 449 (citations and quotation marks omitted).

Applying this analysis, we conclude that APL carried its initial burden with respect to the first shipment, and that G-10 failed to carry its burden of disproving fair opportunity. G-10 knew of APL's alleged derelictions with respect to this shipment, and in fact knew the extent of its injury at a time when it had received and accepted the bill of lading. Yet, it waited until after the limitations period described in the bill had expired before bringing suit. This is not a case where the bill of lading was delivered too late for the shipper to take action to avoid detriment arising from conditions first disclosed by the contents of the bill.

The record is quite different with respect to the second shipment. The record contains a copy of the front of the bill of lading, but there is no signature or other indication that anyone accepted or negotiated this bill on behalf of G-10. The record does reveal that the bill was not prepared until after APL's ship bearing the resin had reached Hong Kong, and it is silent as to when the bill of lading was delivered to G-10. We conclude that APL failed to carry its burden of proving that G-10 had notice and a fair opportunity to avoid the consequences of the attempted inclusion of a statute of limitations for claims arising from post-delivery damage to the goods. The district court properly denied APL's defense of limitations with respect to the second shipment.

B.

The facts of the third and attempted fourth shipments are unlike those surrounding the first two. Although the

record shows that APL issued a bill of lading for the third shipment, the record is silent as to when, if ever, this bill of lading was delivered to G-10. Thus, APL failed to carry its burden of showing that G-10 had notice of the provisions incorporating and extending COGSA's statute of limitations or that G-10 ever accepted those terms. The district court correctly denied APL's defense of limitations to the extent it applied to the third shipment. Since APL held the last four containers and never shipped them, there was no bill of lading. Because COGSA applies only "tackle to tackle" and these containers were never loaded on a ship, G-10 was entitled to go forward with its claims of negligence and negligent or intentional misrepresentation insofar as they applied to claims based on APL's mishandling of these four containers.

C.

We reject APL's contention that filing a bill of lading with the FMC gives a shipper constructive notice and binds the shipper to all conditions set forth in the bill of lading. We agree with the *Allstate* court and others that have held filing with the FMC gives a shipper notice only of the tariff. Limitation of liability provisions are not related to rates or charges and are not required to be included in the tariff. *Marvirazon Compania Naviera, S.A. v. H.J. Baker & Brothers*, 674 F.2d 364, 366 n.1 and 2 (5th Cir. 1982) (quoted in *Allstate*, 703 F.2d at 500).

V.

Inasmuch as a new trial is required on G-10's claims related to the second, third and fourth shipments, we consider next G-10's principal contention on appeal—that the

district court abused its discretion in denying G-10's motion to amend its complaint to include a claim for punitive damages.

A.

The district court found that G-10 could potentially recover punitive damages under either federal maritime law or Minn. Stat. §549.191. Under maritime law, punitive damages are warranted where the defendant has acted with "reckless or callous disregard for the rights of others or for conduct which shows gross negligence or actual malice or criminal indifference." *Churchill v. F/N Fjord*, 892 F.2d 763, 772 (9th Cir. 1988), *cert. denied*, 497 U.S. 1025 (1990); See also *Complaint of Merry Shipping, Inc.*, 650 F.2d 622, 625 (5th Cir. 1981) (punitive damages warranted where defendant acts "willfully and with gross disregard for the plaintiff's rights").

In Minnesota, a plaintiff makes a prima facie case for punitive damages by establishing "clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others." Minn. Stat. §§549.19, 549.20. A defendant operates with "deliberate disregard" by acting with intent or indifference to threaten the rights or safety of others. *Id.* A plaintiff may not place a claim for punitive damages in its original complaint, but must make a motion to amend its pleadings to include punitive damages. Minn. Stat. §549.191. This policy was enacted to prevent frivolous punitive damage claims by allowing a court to determine first if punitive damages are appropriate. *Bougie v. Sibley Manor, Inc.*, 504 N.W. 2d 493, 499 (Minn. App. 1993). The trial court has discretion in allowing a plaintiff to amend its complaint to assert punitive damages, *Robert Utecht v. Shopko Dept. Store*, 324 N.W.2d 652, 654 (Minn. 1982), but "may not allow an

amendment where the motion and supporting affidavits do not reasonably allow a conclusion that clear and convincing evidence will establish the defendant acted with willful indifference . . . ." *Swanlund v. Shimano Industrial Corp., Ltd.*, 459 N.W.2d 151, 154 (Minn. App. 1990).

The district court gave the following explanation for its denial of G-10's motion to amend its complaint to include a claim for punitive damages:

> [G-10's] assertions provide at best only circumstantial evidence that APL acted recklessly, willfully, deliberately or with gross disregard for gamma-10's rights. APL could have committed all of the alleged acts with mere indifference to plaintiff's rights, thus the Court concludes that gamma-10 has not established a prima facie case by clear and convincing evidence under Minnesota law and has failed to present sufficient evidence to warrant punitive damages under maritime law. Accordingly, gamma-10's motion for leave to amend its complaint to state a claim for punitive damages is denied.

Given Minnesota's requirement of clear and convincing evidence and the policy considerations behind Minn. Stat. §549.191, we will not disturb the district court's ruling insofar as it refused to permit the amendment and instruct the jury that G-10 could recover punitive damages under Minnesota law. The claim for punitive damages under maritime law, as the district court recognized, presents a question of federal law and disposition of the motion to amend is controlled by FED. R. CIV. P. 15.

B.

Rule 15(a) provides that leave to amend "shall be freely given when justice so requires." Rule 15(b) states that "[w]hen issues not raised by the pleadings are tried by

express or implied consent of the parties, they shall be treated in all respects as if they have been raised in the pleadings." G-10 argues that it was entitled to amend under both Rule 15(a) and (b) and that the district court abused its discretion in denying the motion.

In *Foman v. Davis*, 371 U.S. 178 (1962), the Supreme Court prescribed the proper approach under Rule 15(a) when a party makes the motion to amend pleadings:

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be "freely given." Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.

Id. at 182.

This court has stated that a party's motion to amend should be dismissed on the merits "only if [it] assert[s] clearly frivolous claims or defenses." *Buder v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 644 F.2d 690, 695 (8th Cir. 1981). Likelihood of success on the new claim is no basis for denying an amendment unless the claim asserted therein is clearly frivolous. *Id.* at 695. Based on G-10's assertions at trial, G-10's punitive damages claim was not "clearly frivolous" and the district court should

have allowed G-10 to amend its complaint. APL's agents purportedly falsified custom applications in Whampoa, illegally emptied sealed containers full of resin onto the docks of Whampoa and Shanghai, ignored G-10's claims for lost goods, and after the goods were found refused to provide access to them. APL also mistakenly shipped goods it should not have, allegedly overcharged for storage of the mistakenly shipped goods, and misrepresented storage costs in Los Angeles and shipping costs to Jakarta.

G-10 also contends that the district court should have permitted the amendment under Rule 15(b) because APL impliedly consented to litigation of the punitive damages issue. The court encourages granting amendments to conform to evidence received during trial. An amended complaint that "merely amplifies some of the allegations that have been proven" should be allowed. *Herrera v. Valentine*, 653 F.2d 1220, 1224 (8th Cir. 1981). On the other hand, however, a district court is not required to grant a motion to amend on the basis of some evidence that would be relevant to the new claim if the same evidence was also relevant to a claim originally pled. The introduction of such evidence does "not provide the defendant any notice" that the implied claim was being tried. *Pariser v. Christian Health Care Systems, Inc.*, 816 F.2d 1248, 1253 (8th Cir. 1987).

G-10 notified APL ten days before trial that "Gamma 10 intends to move the Court for a punitive damage instruction," and the district court found that "APL was clearly on notice before trial that Gamma-10 might seek punitive damages." The court also acknowledged that APL defended against a punitive damages claim, but reasoned that it was merely a "prudent litigation strategy" for APL to protect against a possible punitive damages

claim pending the district court's ruling on the matter. The court found that APL did not impliedly consent to trying the punitive damages issue, as was evidenced by APL's opposition to G-10's motion to amend its complaint.

Several times during the trial, G-10 pointed to APL's "deliberate disregard for the rights of Gamma-10," in reference to the Minnesota standard of punitive damages. Moreover, the district court allowed an APL claims manual into evidence over the objection of APL after G-10 argued that it was relevant to the "claim for punitive damages for deliberate disregard for the rights of Gamma-10." The district court also allowed an APL employee to discuss the inaccessibility of G-10's resin in China after G-10 argued that the evidence "goes to what we will be moving for in our punitive damages instruction. . . ." Finally, in closing argument APL itself questioned whether evidence introduced at trial showed that it acted with "deliberate disregard for someone's rights." APL even admits, in its brief on appeal, that G-10's original claims included "punitive damages, because of APL's refusal to release cargo to G-10 without payment of freight and port imposed demurrage charges."

Despite G-10's references to punitive damages during trial and the notice given to APL prior to trial, APL never objected to G-10's use of punitive damages evidence. *United States v. Sci., Inc.*, 828 F.2d 671, 677 (11th Cir. 1987) (failure to object to evidence raising issues outside of pleadings constitutes implied consent). In fact, the district court found that APL defended against G-10's punitive damages claim. See *Herrera*, 653 F.2d at 1223-24 (where defendant introduces evidence in opposition to claim, issue is litigated by consent).

C.

We believe that the district court denied the motion to amend by weighing the likelihood of success on the punitive damages claim. The court found that the evidence offered by G-10 in support of punitive damages was "circumstantial" but it did not address the requirements of Rule 15. We conclude that Rule 15 required the court to grant G-10's motion unless the evidence was clearly insufficient under maritime law to support a claim for punitive damages. G-10 put APL on notice early in the proceedings that it sought punitive damages. Further, at several points during the trial, counsel for G-10 argued with respect to proffered evidence that such evidence went to the question of punitive damages. Although some of the evidence related to G-10's breach of contract claim as well as a claim supporting punitive damages, the complaint charged APL with the torts of negligence and negligent or intentional misrepresentation and G-10 introduced evidence of conduct by APL that was relevant only to those claims. Throughout the trial G-10 sought to show that APL had acted with deliberate disregard for its rights and had acted maliciously toward it.

It is well settled that punitive damages may be recovered under general maritime law "for conduct which manifests reckless or callous disregard for the rights of others or for conduct which shows gross negligence or actual malice or criminal indifference." *Churchill v. F/V Fjord*, 892 F.2d 763, 772 (9th Cir. 1988), *cert. denied*, 497 U.S. 1025 (1990) (citation and interior quotation marks omitted). While admiralty law does not permit an award of punitive damages for breach of contract, it does permit such damages where the defendant's actions constitute an independent tort in addition to being a breach of contract.

Thyssen, Inc. v. S.S. Fortune Star, 777 F.2d 52, 62-63 (2d Cir. 1985) (citing Restatement (Second) of Contracts §355 (1979)).

On the record before us we conclude that the district court abused its discretion in denying G-10's motion to amend the complaint to include a claim for punitive damages. G-10 made the denial one of its bases of its motion for a new trial. Upon remand, the district court will grant a new trial on the claims related to the second, third and fourth shipments of resin. If the evidence concerning APL's allegedly tortious conduct is substantially the same as the first trial, the district court will instruct the jury on G-10's claim for punitive damages under maritime law.

VI.

The remaining issues raised on appeal require little discussion.

We find no abuse of discretion in the district court's evidentiary rulings. We cannot anticipate situations that may arise at another trial requiring rulings on evidentiary matters. If evidentiary questions are raised at a second trial, however, the experienced trial judge will again exercise his discretion in disposing of them.

Likewise, we find no abuse of discretion in the trial court's denial of attorney fees. Attorney fees generally are not allowed in admiralty cases absent a showing that the losing party acted in bad faith. *Goodman v. 1973 26 Foot Trojan Vessel*, 859 F.2d 71, 74 (8th Cir. 1988). The district court found that APL was not guilty of bad faith and we will not disturb that finding.

The district court awarded G-10 prejudgment interest. We find the court's method of calculating prejudgment

interest and the rate applied reasonable. If the jury awards G-10 damages at a second trial, the district court may award prejuducial prejudgment interest on the same basis that it made the calculations following the first trial.

CONCLUSION

The judgment of the district court is affirmed in part and reversed in part. The case is remanded for a new trial and such further proceedings as may be required, consistent with this opinion.

APPENDIX B

[Dated July 20, 1992]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Cv. No. 3-90-428

Gamma 10 Plastics, Inc., Plaintiff,

vs.

American President Lines, Ltd.
and American President Companies, Defendants.

ORDER

The above-entitled matter came before the Court on June 5, 1992, upon the motion of plaintiff Gamma 10 Plastics, Inc. for partial summary judgment dismissing five of the affirmative defenses of defendants. Scott A. Johnson appeared on behalf of the plaintiff. Michael Snyder appeared on behalf of the defendants.

Based upon the arguments of counsel, all facts, files, and records herein, the Court HEREBY ORDERS that the motion of plaintiff Gamma 10 Plastics, Inc. for partial summary judgment is GRANTED and the affirmative defenses set forth in paragraphs a, b, c, d, and e of defendants' Answer to the amended complaint are DISMISSED.

DATED: July 20, 1992.

/s/ Robert G. Renner, Senior Judge
United States District Court

MEMORANDUM

Background

This dispute arises from a shipping agreement between plaintiff Gamma 10 Plastics, Inc. and defendant American President Lines, Ltd., a subsidiary of defendant American President Companies.

Plaintiff is a Minnesota corporation which manufactures plastic resin pellets. Defendant is a Delaware corporation involved in the shipping and container distribution business. In the summer of 1988, plaintiff contracted with defendant to deliver containers of plastic resin pellets to the People's Republic of China. Between July and October of 1988, defendant transported three shipments of plaintiff's pellets to China.

The first shipment was loaded onto defendants' vessel in Seattle, Washington, on July 20, 1988. The next day, defendant issued a bill of lading, numbered 155769, for this shipment. This bill of lading, and the subsequent bills of lading for the other shipments, all contained clauses limiting the remedies available to plaintiff and the time within which plaintiff could bring suit.

The parties sharply disagree about when plaintiff received the original bill of lading. However, they agree that it was sent by mail no earlier than the date it was issued, July 21, 1988. The parties also agree that defendant filed a copy of the bill of lading as part of its tariff with the Federal Maritime Commission.

Each shipment of plaintiff's resin was discharged in Hong Kong and subsequently transported to the People's Republic of China. Plaintiff asserts that defendant then lost the resin, and that it was not located until three months later when the president of Gamma 10 Plastics,

Joseph Kopstein, traveled to Whompoa. He says that he found the goods in a deteriorated condition, removed from their sealed containers and lying exposed to the elements under a canopy on the dock. Plaintiff alleges that the delay and the deterioration of the resin caused the buyer to cancel its supply contracts for future years, which were worth tens of millions of dollars to plaintiff.

Defendants reject this version of the facts. They maintain that the goods sat on the dock because the buyers rejected them, finding them to be of inferior quality.

Plaintiff moves for dismissal of five affirmative defenses set forth in paragraphs a, b, c, d, and e of defendants' Answer to the amended complaint. These affirmative defenses are all based upon clauses in the bills of lading and sections of the Carriage of Goods by Sea Act ("COGSA"), 42 U.S.C. §§ 1301-1315. The following is a summary of these defenses:

a) the complaint is time barred, according to Clause 24 of the bills of lading and 46 U.S.C. § 1303;

b) defendant's liability is limited to $500.00 per package and/or freight unit, pursuant to Paragraph 4 of the bills of lading 46 U.S.C. § 1304(5);

c) paragraph 11 of the bills of lading allows for transshipment or substitution of the vessel;

d) defendant is not liable for consequential damages due to late delivery, under paragraph 12 of the bills of lading; and

e) delivery to a forwarding agent, carrier, warehouse, or storage facility constitutes complete delivery, under paragraph 13 of the bills of lading.

Analysis

COGSA "applies of its own force only to the period while the goods are actually on board the vessel . . ." Defendants' Memorandum in Opposition, p. 20; 46 U.S.C. § 1301(e). The earlier Harter Act, codified at 46 U.S.C. § 190, *et seq.* governs the period after the discharge of the goods. 46 U.S.C. § 1311. COGSA provides, in part:

> Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect.

46 U.S.C. § 1303(8). Courts have used this section to strike down clauses in bills of lading that limit the responsibilities of carriers during the carriage of goods. *Encyclopedia Britannica, Inc. v. SS Hong Kong Producer,* 422 F.2d 7 (2nd Cir. 1969).

The affirmative defense set forth in paragraph c of the Answer relies upon terms in the bills of lading which purport to alter the obligations and liabilities of the carrier during the period between loading and discharge. This defense is invalid under COGSA, 46 U.S.C. § 1303(8).

The other defenses pertain to defendants' conduct after they discharged the goods from their vessel. As to these defenses, the issue is whether the parties contracted to make the terms of COGSA govern post-discharge conduct. Section 1307 of COGSA allows parties to enter into such contracts:

> Nothing contained in this chapter shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation, or exemption as to the responsibility and liability of the carrier or the

> ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea.

Accordingly, it has been held that parties may contractually extend COGSA's application to the period after discharge, but when they do so, COGSA applies merely as a contractual term. *Colgate Palmolive Co. v. S/S Dart Canada*, 724 F.2d 313 (2nd Cir. 1983), *cert. denied*, 466 U.S. 963. Other principles of contract law still govern the efficacy of such an attempt to insert terms into a contract. *Id.*

The bills of lading purport to extend COGSA to post-discharge conduct, but plaintiff contends that the liability limitations contained in the bills of lading are not binding, because the bills of lading were delivered to plaintiff after the goods had been shipped.

Many courts, as well as Congress, have noted the great inequality in bargaining power between shippers and carriers. Consequently, some courts have held that a carrier is estopped from invoking an exculpatory clause in a bill of lading which is issued to the shipper after his goods are shipped, where the clause is not brought to the attention of an inexperienced shipper. *See, e.g.*: *Encyclopedia Britannica, Inc. v. SS Hong Kong Producer*, 422 F.2d 7 (2nd Cir. 1969). The filing of the bill of lading with the Federal Maritime Commission has no effect on this rule. *Allstate Insurance Co. v. International Shipping Corp.*, 703 F.2d 497 (11th Cir. 1983).

Defendants have not cited any cases refuting or distinguishing *Encyclopedia Britannica* and the numerous cases following it. During argument, defendants referred to several cases not cited in its briefs, yet none of these cases limited the holding of *Encyclopedia Britannica*. *Huosong*

(America), Inc. v. American President Lines, Ltd., 773 F.Supp. 577 (S.D.N.Y. 1991); *Seguros "Illimani" et al. v. M/V Popi, P, her Engines, et al.*, 735 F.Supp. 108 (S.D. N.Y. 1990), *aff'd* 929 F.2d 89 (2nd Cir. 1991); *Miller Export Corp. v. Hellenic Lines, Ltd.*, 534 F.Supp. 707 (S.D. N.Y. 1982).

The Court concludes that the clauses in the bills of lading designed to extend COGSA to the period after discharge are ineffective, because plaintiff, an inexperienced shipper, was not adequately apprised of these clauses prior to the shipment of the goods.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Gamma 10 Plastics, Inc. Case No. Civil 3-90-428

vs. JUDGMENT IN A CIVIL CASE

American President Lines, Ltd.
and American President Companies, Ltd.

(×) Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

( ) Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is in favor of plaintiff in the amount of $500,000 and against defendants and judgment is in favor of defendants in the amount of $12,769.98 and against plaintiff.

DATE: JUL 19, 1993

FRANCIS E. DOSAL, CLERK

Denise La Fond, Deputy Clerk

/s/ Robert G. Renner, Judge
U.S. District Court

APPENDIX D

[Filed December 17, 1993]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil No. 3-90-428

Gamma-10 Plastics, Inc.,

Plaintiff,

v.

American President Lines, Ltd.
and American President Companies, Ltd.,

Defendants.

ORDER

Plaintiff Gamma-10 Plastics, Inc. moves for prejudgment interest on its verdict of $500,000 against American President Lines, Ltd. and American President Companies, Ltd. (collectively APL). The court awards Gamma-10 $308,417.

I. Background

Gamma-10's business was selling polypropylene resin, a raw material from which plastic products are molded. Gamma-10 purchased trim left over from the production of diapers and contracted with companies known as compounders to reprocess the trim into resin pellets. Gamma-10 then sold the resin to manufacturers of plastic items.

In 1988 Gamma-10 contracted with a buyer in China, VIC International, for the sale of a quantity of resin. Gamma-10 and VIC International also had an agreement covering sales for five years into the future. Gamma-10 contracted with APL to transport the first installment of resin to China. This first installment consisted of a total of 22 twenty-ton containers in five shipments, and had a contract value of approximately $540,000. There were, to put it mildly, problems with these shipments, problems which Gamma-10 asserts led to its demise as a viable business entity.

Gamma-10 claimed that APL negligently mishandled the shipments of resin, thus preventing VIC International from taking delivery of the first installment on time. As a result, Gamma-10 argued, VIC International canceled both the order for containers Gamma-10 had already shipped, and the long-term supply agreement. Gamma-10 further asserted that it could not quickly resell the resin at a market price. It eventually did resell the 22 containers of resin, but at a price substantially below the market rate and after accruing significant storage and shipment costs. However, Gamma-10 claimed that because most of its capital was tied up for so long in shipments sitting in warehouses in China and elsewhere, it was forced to go out of business.

Gamma-10 contended at trial that it suffered $90,000,000 in damages as a result of its inability to sell the 22 containers of resin at the contract price, the loss of the long-term supply contract with VIC International, and the loss of other profits from 1988 through 1993. The jury found for Gamma-10 on its negligence claim, but awarded only $500,000 in damages. Following the verdict, Gamma-10 moved for prejudgment interest.

II. Discussion

The Court has previously addressed Gamma-10's entitlement under Eighth Circuit precedent to prejudgment interest. In an admiralty action such as this one, a prevailing plaintiff is entitled to prejudgment interest " 'unless there are exceptional or peculiar circumstances.' " *United States v. American Commercial Barge Line Co.*, 988 F.2d 860, 863 (8th Cir. 1993) (quoting *Mid-America Transportation Co. v. Rose Barge Line*, 477 F.2d 914, 916 (8th Cir. 1973)). Because APL failed to cite any relevant exceptional or peculiar circumstances, the Court held that there were no grounds for denying Gamma-10's motion.

All that remains is the calculation of the amount of interest to which Gamma-10 is entitled. Determining the amount of prejudgment interest is a factual inquiry to be resolved on the basis of the evidence presented to the court. *See Ohio River Co. v. Peavy Co.*, 731 F.2d 547, 549-50 (8th Cir. 1984). Because the parties' initial memoranda did not lay a sufficient evidentiary foundation for a determination of the interest to be assessed, the Court requested that the parties submit supplemental memoranda on the amount and period over which to assess interest, the interest rate, and the frequency of compounding.

A. Amount Against and Period Over Which to Assess Interest

The first issue is the amount of money against and the period over which to assess interest. Interest must be computed from when the claim accrues until judgment is entered. *West Virginia v. United States*, 479 U.S. 305, 310 n.2 (1987). At trial Gamma-10 claimed damages both from the loss of the sale of the 22 containers of resin it entrusted to APL, and from the loss of profits from 1988 to 1993.

Gamma-10's claim for the loss of the resin arose on the date Gamma-10 would have received payment under the contract with VIC International. Therefore, any part of the jury's award that is compensation for that claim should accrue interest from that date. But any portion of the award that reflects a loss of profits from later sales should accrue interest only from the point at which Gamma-10 would have earned those profits.

The special verdict form did not ask the jury to indicate whether it intended to award Gamma-10 damages for the loss of the 22 containers, the loss of future profits, or some combination. The size of the verdict, however, is evidence of what category of damages the jury intended to award. The amount of the judgment is close to the approximately $540,000 contract value of the shipments. The closeness of the round-figure award of $500,000 to the contract value of the shipments suggests the jury concluded that APL was responsible for Gamma-10's loss on the 22 containers of resin, but not any loss of future profits. Moreover, the jury could not reasonably have concluded that APL handled the resin shipments non-negligently, but nevertheless caused Gamma-10 to lose future profits. As for the reduced price at which Gamma-10 later sold the 22 containers of resin, the jury may well have concluded that it was offset by the extra time, effort, and expense required to resell the resin. Therefore, the Court concludes that the entire amount of the jury's award represents damages Gamma-10 incurred as a result of and at the time VIC International's cancellation of the contract. Gamma-10 is thus entitled to interest on the whole amount of the judgment from the date it incurred the loss to the date the judgment was entered.

Gamma-10's claim first arose on the date it was entitled to be, but was not, paid by VIC International. Unfortu-

nately, neither party's briefs indicate what this date was. APL's brief, however, presumes that Gamma-10 incurred all of its losses under the contract on October 4, 1988, the date VIC International was to take delivery of the first shipment of resin. In the absence of more precise evidence of when Gamma-10's claim arose, the Court concludes that it is entitled to interest from October 4, 1988 to July 19, 1993, the date judgment was entered.

B. Interest Rate

The next issue is what the interest rate should be. The principal purpose of an award of prejudgment interest is to ensure that the injured party is fully compensated. *See West Virginia*, 479 U.S. at 310 n.2. Two subsidiary purposes are to prevent the wrongdoer from gaining a windfall and to remove an incentive to prolong litigation. *See General Motors Corp. v. Devex Corp.*, 461 U.S. 648, 655 n.10 (1983). Thus, the rate applied should reflect the rate prevailing during the relevant period. *See United States v. Motor Vessel Gopher State*, 614 F.2d 1186, 1190 (8th Cir. 1980); *Matter of Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1332 (7th Cir. 1992). Determining the market rate is a factual inquiry which the court must resolve on the basis of the evidence presented to it. *Ohio River Co.*, 731 F.2d at 550.

But whose rate in which market? Neither the Supreme Court nor the Eighth Circuit Court of Appeals has addressed this issue. *See, e.g., West Virginia*, 479 U.S. at 310 n.2 (merely noting that prejudgment interest "serves to compensate for the loss of use of money due as damages"). The Seventh Circuit Court of Appeals, however, has confronted the problem. Two Seventh Circuit opinions dealing with prejudgment interest conceive of a prevailing tort plaintiff as an unwilling creditor of the defendant.

Amoco Cadiz, 954 F.2d at 1332; *Gorenstein Enterprises v. Quality Care-USA*, 874 F.2d 431, 436 (7th Cir. 1989). This perspective led the *Amoco* and *Gorenstein* courts to conclude that the appropriate rate is that which the defendant would have had to pay to borrow money during the relevant period. *Amoco Cadiz*, 954 F.2d at 1332; *Gorenstein*, 874 F.2d at 436. The premise for this conclusion is that what the defendant would have had to pay during the term of the "loan" reflects the three elements of a market rate; the social return on investment, i.e., how much it would have cost to bid money away from other productive uses; anticipated inflation during the term of the loan; and the risk of nonpayment. *Amoco Cadiz*, 954 at 1332.

The *Amoco* and *Gorenstein* courts suggested that district courts engage in either "refined rate-setting" or use the prime rate. *Amoco Cadiz*, 954 F.2d at 1332; *Gorenstein*, 874 F.2d at 436. "Refined rate-setting" would entail determining what the defendant actually would have paid to borrow money during the litigation. *Amoco Cadiz*, 954 F.2d at 1332. On the other hand, the Seventh Circuit suggested, courts could use the prime rate because it is readily ascertainable, reasonably fair approximation of a defendant's cost of funds. *Id.* The prime rate is the rate banks charge their most credit-worthy customers for short-term unsecured loans. *Id.*

Although the Seventh Circuit's approach is based on an intriguing view of the relationship between a prevailing plaintiff and a defendant, it does not always fully effectuate the purposes of an award of prejudgment interest. If the only purposes for awarding prejudgment interest were to avoid granting the wrongdoer a windfall and to remove the incentive to prolong litigation, the appropriate rate would indeed be the cost of money to the wrongdoer during the relevant period.

The primary purpose of awarding prejudgment interest, however, is to fully compensate the injured party for the loss of use of money. If the injured party could have earned more with the money than the wrongdoer would have paid to borrow it, awarding interest at the wrongdoer's rate would undercompensate the injured party. Therefore, in determining the interest rate, the aim should be to award the greater of the cost of money to the wrongdoer or the return the injured party could have earned.

To assist the court in determining the appropriate rate, Gamma-10 has offered evidence of three different types of rates: (1) the return it would have achieved had it invested the money in its own business, (2) the rate Gamma-10 would have had to pay to borrow a similar sum of money, and (3) the return Gamma-10 could have achieved by investing the money in stocks or bonds.

Gamma-10 argues that the court should base the interest award on the rate it claims it would have achieved by investing the money in its own business. Had it received the $500,000 at the time its claim arose, according to Gamma-10, it would have invested the money in its business, just as would any other prudent company under similar circumstances. Based on the extensive evidence about the operations of Gamma-10 that it heard at trial, the court has no reason to doubt this. The appropriate compensation to Gamma-10 for its loss of the use of the $500,000, therefore, would be an award of interest at the rate Gamma-10 would have earned during the relevant period.

Based on extrapolations from its activities before the ill-fated China sale, Gamma-10's expert Donald Gorowsky states that from 1988 to 1993, Gamma-10 would have achieved an average annual profit return of 31.27 per cent.

Compounded annually, Gorowsky states that this rate would yield $1,448,935 on $500,000 between July 1, 1988 and July 1, 1993.

The jury's verdict, however, precludes an award of interest based on the profits Gamma-10 would have earned by investing the amount of the judgment in its business. At trial, Gamma-10 established that shortly after the contract with VIC International fell through in 1988, it effectively ceased operations. The only significant activities Gamma-10 conducted after the contract fell through were its efforts to find a new buyer for the shipments of resin in APL's possession.

Although the jury agreed with Gamma-10's claim that APL was negligent with respect to the shipments of resin, the amount it awarded Gamma-10 was slightly less than the correct cost of the shipments of resin. Therefore, as the court has already concluded, the jury implicitly but clearly refused to award damages for any loss of future profits. This implies, in turn, that the jury concluded that Gamma-10 would have failed regardless of APL's negligence. Because Gamma-10 would have failed despite APL's negligence, it would not have shown any return on the $500,000 by the summer of 1993.

The second measure Gamma-10 suggests is the rate it would have had to pay to borrow $500,000 during the relevant period. Gamma-10 contends that because it was a new company with a short track record, it would have had to pay a commercial lender the prime rate plus 3 per cent. This measure is irrelevant because there is no evidence that Gamma-10 did or could have borrowed any money to make up for the losses associated with the APL shipment. Had Gamma-10 borrowed $500,000, an award of interest at the rate it would have paid for the loan

would, of course, very closely reflect the cost to Gamma-10 of the loss of use of the money.

The third measure, the return on an "average risk or low risk" investment, Gamma-10 argues, is a good measure of the return on an average, acceptable risk investment. This would be reflected by the performance of the Dow Jones Average of 30 Industrials, the Standard and Poors 500 Stock Index, or the Lehman Brothers Government and Corporate Bond Index over the relevant period. This measure is irrelevant because there is no evidence that had Gamma-10 been awarded the $500,000 at the time its claim arose, it would have invested the money in stocks or bonds. Indeed, Gamma-10 asserts that it would have invested the money in its own business.

Because Gamma-10 suffered no damages as a result of the loss of use of the amount of the judgment, it is entitled to interest only under the two subsidiary rationales, prevention of unjust enrichment and avoidance of incentive to delay. Under both of these rationales, the relevant measure is the cost of funds to the wrongdoer during the relevant period.

Neither side has submitted highly persuasive evidence of what APL's cost of funds was from 1986 to 1993. Gamma-10 states that, according to APL's financial statements, APL paid annual interest rates of between 10.31% and 11.05% between the date of Gamma-10's claim and the date of judgment. Gamma-10 contends that these rates reflect what APL would have paid to borrow the amount of the judgment over the relevant period. The average rate APL was paying on its existing, long-term loans during this period does not, however, necessarily reflect what it would have paid for a new, additional loan taken out in 1988.

In a late submission supported only by a letter written by its assistant treasurer, APL provides the rates it earned on excess balances from 1986 to 1992. For 1993, APL supplies its average one month rate under a revolving credit agreement, because, it states, it has been a net short-term borrower during this period. The court infers that APL is asserting that it would merely have reduced its cash reserves rather than borrow the amount of the judgment from 1988 to 1991, and that during 1993 it would have taken out a short-term loan. APL provides no evidence, however, that it had enough excess cash to do this, or that, even if it did have sufficient cash, that it would in fact have done so. The court notes, moreover, that APL's financial statements for 1990, 1991, and 1992 list as a long-term debt a note for $660,000. This suggests that APL would have treated the amount of the judgment as a long-term debt rather than reduce its cash reserves or take out a short-term loan.

The court concludes that it is more likely that APL would have taken out a long-term loan for the $500,000 rather than reduce its cash accounts by that amount or take out a short-term revolving loan. Therefore, the court will assess interest at the rates suggested by Gamma-10.

C. Compounding

Because the award of prejudgment interest in this case is based on the cost of money to APL, interest on the judgment should be compounded at the same frequency that APL would have had to make payments on a loan of $500,000. This rate of compounding would duplicate the effective interest rate to APL had it taken out a loan for $500,000 in 1988 and added the amount of interest due to the principal as the interest payments came due. In

the absence of any evidence that the interest should be compounded more frequently, the court accepts Gamma-10's annual compounding.

Using the interest rates APL paid on its outstanding loans and compounding annually, APL would have paid $308,417 to borrow $500,000 from the date Gamma-10's claim arose to the day judgment was entered. The court concludes, therefore, that Gamma-10 is entitled to $308,417 in prejudgment interest on its judgment.

Accordingly, the court GRANTS Gamma-10's motion and awards it $308,417 in prejudgment interest to be paid by APL.

Dated: December 17, 1993.

/s/ Robert G. Renner, Senior Judge
United States District Court

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Corrected Order

No. 93-3285/3286/94-1190MNST

Gamma-10 Plastics, Inc.,

Appellant/Cross-Appellee

v.

American President Lines, Ltd., et al,

Appellee/Cross-Appellant.

Appeal from the United States District Court
for the District of Minnesota

The petition for rehearing filed by the appellee American President Lines, Ltd., et al has been considered by the court and is denied.

October 6, 1994

Order Entered Under Rule 27B(a):

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit